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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. 742

TRANSIT CASUALTY COMPANY, et al.,
Petitioners,

v.

SECURITY TRUST COMPANY, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit.

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PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit.

Transit Casualty Company prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on June 28, 1968.[1]

[1] In addition to Transit Casualty Company, the following parties are petitioners: Charter National Insurance Company; American Mutual Liability Insurance Company; Dorchester Insurance Co. Ltd.; Farmers Elevator Mutual Insurance Company; Agway Insurance Company; LaSalle Casualty Company; Mid-America Fire & Marine Insurance Company; and Mutual Boiler and Machinery Insurance Company.

In addition to Security Trust Company, the following are respondents: The State Treasurer and, ex officio, Insurance Commissioner of the State of Florida, substitute Receiver of McKinley & Company; The Deputy Insurance Commissioner of the State of Florida, deputy Receiver of McKinley & Company.

CITATIONS TO OPINIONS BELOW.

No opinions were rendered by the District Court. The opinion of the Circuit Court of Appeals printed in the Appendix hereto, *infra*, p. A-1, is reported in 396 F. 2d 803. The *uncorrected* opinion of the Circuit Court of Appeals on petition for rehearing and on motion for modification and clarification and for rehearing en banc is reported in 399 F. 2d 665 and is not printed in the Appendix. The *corrected* opinion of the Circuit Court of Appeals on petition for rehearing and on motion for modification and clarification and for rehearing en banc printed in the Appendix hereto, *infra*, p. A-2-3, is not yet reported in the Federal Reporter.

JURISDICTION.

Judgment of the Circuit Court of Appeals was entered on June 28, 1968. CCA-R. 448[2]; p. A-4-5, *infra*. Rehearing was denied on August 29, 1968. CCA-R. 513; p. A-2-3. The jurisdiction of this Court is invoked under 28 U. S. C., § 1254 (1) the pertinent portion of which is as follows:

> "Cases in courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> "(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . ."

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[2] "CCA-R." references refer to the folios in the record of proceedings before the Circuit Court of Appeals, designated by that court as Transcript of Record, Volume V; "R." references refer to the folios in the record of proceedings before the District Court, nine copies of which have been filed herewith.

QUESTIONS PRESENTED.

1. Where parties sue for recovery of damages on their own behalf and on behalf of others similarly situated, can the lower court, without denying due process, enter a final dismissal for non-joinder of the only non-diverse persons in the class (three Florida companies) before making the mandatory determination of the maintainability *vel non* of the suits as class actions, as required under Rule 23 (c) (1), where joinder before the making of such determination would destroy federal jurisdiction but after such determination would not; and, particularly where the statute of limitations has run so as to be a bar to any future suit?

2. Under the above circumstances, is due process denied the parties of record whose claims, pleaded independent of those of the class, are also foreclosed by the dismissal; particularly where there is no finding, and there can be no finding, that the persons whose joinder the lower court sought to enforce are indispensable for any purpose in either the class action or with respect to the claims independent thereof?

3. In an action by Petitioners on their own behalf and on behalf of others as a class, where the lower court, acting pursuant to Rule 23 (c) (2), officially notified all members of the class that:

a. "You have an interest in the outcome of this litigation," and

b. "The judgment whether favorable or not in this litigation, will include all members who do not request exclusion," and

where pursuant to and in compliance with such notice, 1551 members of the class (including the three Florida companies) elected to be included as class members, with-

out actively participating as parties, does not an order of final dismissal (after bar by limitations and without the mandatory notice to the class, as required under Rule 23 (e)), amount to a denial of due process?

4. Where the manner in which amended Rule 23 was construed by the district court and sanctioned by the court of appeals violates each and every mandate contained in that Rule and patently disregards the use of other Federal Rules of Civil Procedure as a means of preserving the rights of a class; and, the sole basis for dismissing these class actions is without precedent in American jurisprudence and is in direct conflict with the principles contained in a controlling decision of this Court,[3] which states the proper manner of construing federal Rules, should not this Court invoke its jurisdiction and exercise its supervisory powers to review the proceedings below?

STATUTES AND RULES INVOLVED.

The statute involved is 28 U. S. C., § 1254 (1), only the pertinent portion of which was printed, *supra*, p. 2. The rules involved are the Federal Rules of Civil Procedure numbers 1, 19, 20, 23, 41 and 86.

STATEMENT.

Petitioners, on behalf of various corporations and individuals,[4] filed two class actions in January and February, 1966, in the United States District Court for the Southern

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[3] *Provident Tradesmens Bank and Trust Co. v. Patterson*, ... U. S. ..., 19 L. Ed. 2d 936, 88 S. Ct. .... (1968).

[4] By leave of court (R. 209, 210), the complaints were amended to enlarge the class from the 26 original corporations to 39 corporations and 1,521 individuals (R. 193-196). Respondent answered the amendments to the complaints on November 1, 1966 (R. 213).

District of Florida, Miami Division, to recover trust funds alleged to have been misappropriated through the negligent and fraudulent acts of respondent, Security Trust Company. Jurisdiction was based upon diversity of citizenship and amount. Each complaint alleged facts essential to the maintenance of a class action under Rule 23, Federal Rules of Civil Procedure, as then in effect, and pleaded rights independent of the class (R. 13, 261). Answers to the complaints, *inter alia*, admitted petitioners' diverse citizenship and the jurisdictional amount involved. Both cases were at issue on the pleadings at March 7, 1966 (R. 76, 285).

During June 1966, respondent's counsel began corresponding directly with all members of the class not named as parties (R. 107). Upon immediate notice to cease (R. 105) respondent's counsel, by reply, challenged any jural relationship between counsel for petitioners and members of the class not named as parties (R. 105-106). Petitioner immediately moved for a protective order (R. 101). After hearing thereon, the District Court entered an order dated September 14, 1966 (hereinafter September Order) which was to become the genesis for the subsequent order of dismissal with prejudice (R. 176 at 179). Paragraph 1 of the September Order read:

> "1. Plaintiffs shall within ten (10) days hereafter amend their complaints so as to include as parties Plaintiff all members of the alleged class who have *retained*[5] counsel for Plaintiffs to represent them in these two cases."

The September Order further required the clerk to send notices to each member of the class, pursuant to Rule 23 (c) (2), as amended July 1, 1966. Under the terms and conditions of the notice sent by the clerk (R. 188),

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[5] Emphasis ours.

members of the class were given the following alternatives in addition to the right to remain inactive class members:

1. Exclusion, if requested in writing before October 28, 1966, or,

2. The right to participate actively as a party by filing their appearance with the clerk on or before October 28, 1966.

The class members were advised in the notice that the judgment, whether favorable or not, included all members who did not request exclusion. The notice also advised each member, "You have an interest in the outcome of this litigation" (R. 188).

Motions to amend the September Order by eliminating Paragraph 1 therefrom, for leave to file an interlocutory appeal, for modification of the September Order and for writ of prohibition from the Court of Appeals were denied (R. 182, 183, 187, 191, 209, 210, 215).

On May 9, 1967, the complaints were amended *pursuant to the September Order* by adding as named parties plaintiff seven additional corporate members of the class (R. 221).

Counsel for petitioners filed an affidavit of compliance with the September Order by July 1[illegible], 1967 (R. 228). No counter-affidavits were filed by the respondent.

As of May 9, 1967, in accordance with the terms and conditions of the notice to members of the class, the composition of the class was as follows:

1. Three corporate members, including one Florida domiciliary, requested exclusion in writing (R. 209-212);

2. Thirty corporate members, including three Florida domiciliaries, and 1,521 individuals had elected to be included as members of the class without becoming named parties or actively participating in these actions (R. 228);

3. Nine corporate members of the class were named as parties plaintiff and were the active class participants (R. 228).

On May 18, 1967, respondent filed its motion to dismiss, upon the ground that petitioner's failure to name as parties plaintiff the *four* Florida domiciliary companies, who were members of the class, constituted a palpable attempt to circumvent the September Order and was a failure to comply therewith (R. 226). Respondent's motion to dismiss was predicated upon its allegation that petitioners' counsel had been *retained* by the Florida companies and petitioners had represented to the District and Circuit Court that such retainer had been made (R. 226). The Record contains no such representation by petitioners or their counsel. It does contain the direct opposite—that counsel for petitioners were *not* retained by the Florida companies (R. 258 and 228). The only position of counsel for petitioners was that all members of the class were *represented* by him through his *retention* by the original named parties plaintiff (R. 242).

On July 12, 1967, the District Court entered an order dismissing both causes with prejudice, pursuant to Rule 41 (b), for petitioners' failure to join the *three* Florida corporations (R. 229). No notice of dismissal was given to members of the class (R. 231). The joinder of these corporations would per force destroy federal jurisdiction as their citizenship is the same as that of respondent (R. 12). There is no challenge of petitioners' ability to fairly and adequately represent the class and there is no finding by the District Court on this point in the Record. The Record contains no finding that the Florida corporations are indispensable parties.

The District Court correctly stated the provision of paragraph 1 of the September Order in the first paragraph of the order of dismissal (R. 229). However, in the second paragraph of the order of dismissal the District Court

bases the dismissal upon petitioners' failure to perform a condition which did not exist in the September Order, i. e., that petitioners failed to amend the complaints to include as parties members of the class *represented* by counsel for petitioners (R. 229, 230).

On July 17, 1967, pursuant to Rule 59, petitioners filed motions to reconsider, amend or vacate the order of dismissal (R. 231) which motions were denied July 28, 1967 (R. 259).

An appeal to the Court of Appeals for the Fifth Circuit followed and on June 28, 1968, the Court of Appeals affirmed the dismissal but vacated that portion of the order making the dismissal with prejudice (CCA-R. 446-447).

Timely petition for rehearing, suggestion for rehearing en banc and alternative motion for modification and clarification of the Circuit's June 28 opinion were filed and on August 29, 1968 were denied (CCA-R. 513-514).

The Court of Appeals refused to modify its June 28 opinion, notwithstanding that the Florida statute of limitations had run against the filing of another suit by Petitioners, or any of them, against the respondent (CCA-R. 514).

REASONS FOR GRANTING THE WRIT.

Conflict of Decisions.

The decision of the court below is in direct and irreconcilable conflict with the principles announced by this Court in *Provident Tradesmens Bank and Trust Co. v. Patterson,* ... U. S. ..., 19 L. Ed. 2d 936, 88 S. Ct. ... (1968). In a unanimous opinion, in *Provident,* this Court reversed the Court of Appeals for the Third Circuit for its inflexible application of Rule 19. In its application of Rule 23 in the cases at bar, the Court of Appeals for the Fifth Circuit has

imposed a construction of the Rule so rigid and so harsh that the Rule now constitutes a procedural trap to litigants otherwise entitled to the use of a class action device in the redress of wrongs done them. In addition, the Circuit callously disregarded the rights of 1560 litigants by specifically refusing to consider the alternative procedures, provided by this Court under the Federal Rules, which are designed to preserve such rights.

This Court left nought to chance on how the Federal Rules of Civil Procedure were to be construed—"They shall be construed to secure the just, speedy and inexpensive determination of every action."[6]

The decision of the Fifth Circuit in these cases has eliminated Rule 23 from being construed in accordance with the provisions of Rule 1. The Circuit has further eliminated Rules 19 and 20 from being used in aid of federal jurisdiction and has cast aside the saving provisions of section (d) (4) of Rule 23 in direct violation of a litigant's right to an adjudication upon the merits of claims independently pleaded from the rights of the class of which he is a member.

Federal Rules of Civil Procedure are not islands unto themselves but are the mainland of federal procedure and must be construed and applied in *pari materia* and, while the gravamen of the error is a perversion of Rule 23, the rejection of the commands in Rule 19 has resulted in defeating independent claims as well as those of the class.

The involvement of Rule 19 as an integral part of the duties imposed upon the lower courts, in these cases, may very well result in the judgment complained of being in direct conflict with the decision of the *Provident* case, in addition to its being in conflict with the principles announced therein.

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[6] Rule 1, F. R. C. P.

The principles which this Court considered essential to a proper determination of questions of joinder and indispensability, under Rule 19, in *Provident* have not been complied with in the instant cases and every requirement contained in amended Rule 23 was disregarded by both courts below, with the exception of the notice provision of section (c) (2). The resulting challenge to the scope of amended Rule 23 is, therefore, substantially greater than in *Provident* because of the adverse affect upon innocent members of a class. Although petitioners called *Provident* to the attention of the Court of Appeals,[7] it was to no avail. The opinion of the Court of Appeals[8] in *Provident* is some 24 pages long and provided this Court with the thinking and analysis at the circuit level. In stark contrast, the opinions of the Court of Appeals in the instant cases are *per curiam*, two paragraphs in length and provide no insight into the considerations, if any, given by the circuit to the issues raised on appeal.

The analysis to be conducted by lower courts in properly safeguarding the rights of litigants, through the application of federal rules, as announced by this Court in *Provident,* is completely absent from the instant cases.

There was no determination that the parties of record did not fairly and adequately represent the class. There was no determination that the joinder of the companies demanded by the lower court involved indispensable parties. There was no determination that the actions could be maintained as class actions. There was no order entered requiring the elimination from the complaints of allegations as to the representation of absent members. There was no notice to the class of the proposed final dismissal.

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[7] CCA-R. 496-97.

[8] 365 F. 2d 802 (3rd Cir. 1966).

Essential and prerequisite to the dismissal of class actions under Rule 23, as amended, is a finding by the lower court that questions of law or fact common to the class do *not* predominate over questions affecting individual members, that the class action is *not* superior to other available methods for a fair and efficient adjudication of the controversy, that the interest of the members of the class controlling the prosecution of the action is *not* substantial or significant, that there is *not* other litigation pending by members of the class the extent and nature of which would render the federal action unfeasible, that it is *not* desirable to concentrate the litigation of claims in the federal forum and that the management of the class is one which *cannot* feasibly be undertaken. None of these findings exist in the instant case and, presumably, the Court of Appeals has abolished these requirements.

The only consideration given, by either the district court or the Court of Appeals, to Rule 23 was the use of the notice provision through which the district court created a legal smoke screen and into which the as yet unlitigated claims of 1560 litigants disappeared.

No consideration whatsoever was given to the total absence of any other remedy than the instant suits for the claims of the parties of record and those of the class. The court of appeals in its August 29, 1968 *per curiam* opinion summarily rejected any consideration of the statute of limitations having run.

Each of the above omissions was given careful consideration by this Court in *Provident,* and this Court specifically stated that an examination of the controversy was to be made in accordance with the analysis required under the pertinent Rule.

There is no dearth of law at any federal level outlining the proper application of the Rules. Classic in its approach, fair in its application and just in its effect is the

class action procedure involved in *Philadelphia Electric Co. v. Anaconda American Brass Co.*, 43 F. R. D. 452 (E. D. Pa. 1968) which demonstrates the manner in which this Court has commanded the federal Rules be applied, as opposed to the application by the lower courts here.

Counsel can find no case in the Fifth or any other Circuit where a dismissal, at a time when limitations had run against the bringing of further actions, was enforced under so bizarre a circumstance as here exists. Cases before the Fifth Circuit involving any element of the issues raised in these actions were decided exactly opposite from the decisions reached here[9] and in a case virtually on all fours[10] the Fifth Circuit reached an opposite conclusion from that in the instant cases.

The decision of the Fifth Circuit is in conflict with decisions of the Second Circuit,[11] the Eighth Circuit[12]

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[9] *Tardan v. California Oil Company*, 323 F. 2d 717 (5th Cir. 1963), held if diversity was destroyed by additional joinder, court must afford any relief available to existing parties.

Standard Oil Company of Texas v. Marshall, 265 F. 2d 46 (5th Cir. 1959), held court could not dismiss action without finding absent parties were indispensable.

Humphrey v. Standolind Oil and Gas Company, 232 F. 2d 925 (5th Cir. 1956), reversed a dismissal with prejudice entered for plaintiff's failure to join additional parties.

Keene v. Hale Halsell Co., 118 F. 2d 332 (5th Cir. 1940), reversed a decree which extinguished rights merely because of nonjoinder.

[10] *Mackintosh v. Mark's Estate*, 225 F. 2d 211 (5th Cir. 1955), held district court in error for ordering joinder of parties whose joinder would defeat jurisdiction.

[11] *Eisen v. Carlisle & Jacquelin*, 370 F. 2d 119 (2nd Cir. 1966), cert. denied 386 U. S. 1035, 87 S. Ct. 1487, 18 L. Ed. 2d 598 (1967), and *Eisen v. Carlisle & Jacquelin*, 391 F. 2d 555 (2nd Cir. 1968), remanded for full evidentiary hearing on prior findings of the district court noting that dismissal for lack of adequate representation could not be reconciled with the letter or the spirit of the new Rule.

[12] *Reynolds v. Wabash Railroad Company*, 236 F. 2d 387 (8th Cir. 1956), held: Rules not intended to permit a district court on its own initiative to require bringing in parties which would deprive the court of jurisdiction.

and the Ninth Circuit[13] which petitioners believe to correctly enunciate class action and joinder procedure.

Necessity for Exercising the Supervisory Powers of This Court.

A threshold issue must be decided before entering a discussion of the intended application of Rule 23, as amended; the right of the class to notice of dismissal. The old Rule required notice to members of the class of dismissal of "true" class actions[14] because any judgment was binding upon absent members of the class, while leaving such notice discretionary with the court in the "hybrid" and "spurious" class actions[15] where the judgment only bound the parties actually before the court. The abolition of the categories or labels of class actions, by the 1966 amendment to Rule 23, in conjunction with the binding effect of judgment on all members of the class under the new Rule makes notice of dismissal mandatory in all cases and the Rule so provides, leaving only the manner of the notice to the discretion of the court.

Rule 23 had not been amended when the instant suits were filed and no determination of their maintainability as class actions was then required by the court, other than an examination of the complaints which met the Rule requirements. After the effective date of the 1966 amendment to Rule 23, neither the District Court nor the Court of Appeals made the requisite determination that the

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[13] *Harris v. Palm Springs Alpine Estates, Inc.*, 329 F. 2d 909 (9th Cir. 1964). Any deficiency in a class action pleading is subject to correction by amendment and dismissal can only affect absent members of the class.

[14] One of the instant cases is a "true" class action, having been brought by certain members of the class on behalf of themselves and of the Treasurer of the State of Florida, Receiver of McKinley & Company.

[15] One of the instant cases is both "hybrid" and "spurious."

actions were maintainable as class actions, although all factors essential to such determination were before both lower courts. By the terms of the September Order, *supra*, Petitioners were required to join as parties plaintiff all members of the class who had *retained* the law firm of Blackwell, Walker & Gray to represent them. Such an order constitutes a radical departure from the empirical application of any joinder rule, however, failing to maintain relief from the Order, plaintiffs amended in compliance with the Order. Thereafter, the District Court sought to enforce joinder of three Florida corporations, who were the only non-diverse members of a class of 1560, upon the mistaken and unprecedented ground that they were *represented* by the same attorneys as the named plaintiffs. No rule or law exists which requires a party to join others who neither authorized their joinder nor retained counsel for that purpose, absent a finding that indispensable parties have been omitted or that the parties of record do not fairly and adequately represent the class.

Rule 86 requires the application of amended Federal Rules of Civil Procedure to further proceedings in pending cases, after the effective date of the amendment, absent a specific finding by the court that to apply the Rule as amended would not be feasible or would work an injustice. No such finding with respect to the instant cases was made by the district court with respect to the July 1, 1966 amendment to Rule 23. Of what character then is an action under Rule 23, as amended, before the court determines by order that it is to be maintained as a class action? At the very least it must be considered a proceeding under Rule 20 subject to the application of Rule 19 with respect to joinder, loss of diversity of citizenship and retention *vel non* of federal jurisdiction.

After the institution of an alleged class action, its subsequent failure to meet the Rule 23 tests of main-

tainability is procedural and not jurisdictional and any pleaded claims of parties of record may proceed as though the action were one originally instituted under Rule 20.

A proceeding under Rule 20 invokes the provisions of Rule 19 with respect to joinder, indispensability and ultimate federal jurisdiction. Under Rule 19, failure to join an indispensable party warrants dismissal only after a consideration by the court of the factors contained in the Rule, most important of which is "Whether the plaintiff will have an adequate remedy if the action is dismissed for non-joinder." Here the district court is called upon to safeguard by careful consideration the rights of the parties of record. How much greater is the circumspection with which a court must in equity and good conscience evaluate and protect the rights of absent parties when dismissal is contemplated under Rule 23? Certainly notice of dismissal to the absent members is the minimum standard of acceptable procedure, particularly where the district court has previously advised the absent persons that they are part of a class who have an interest in the outcome of the litigation. To allow dismissal without notice to the absent persons under such circumstances is to convert Rule 23 into a legal spring gun, which may at any moment and without notice extinguish property rights of the absent. The equity of such notice is clear. Absent members of the class, other than the three Florida corporations, could have joined as parties plaintiff and preserved their claims independent of their rights as a class. All absent members were diverse citizens, except the three members whose joinder the district court sought to enforce, and federal jurisdiction would have been retained.

The Achilles' heel of Rule 23 lies in the interim period between institution of a suit and court determination of its maintainability as a class action. Under the old Rule where class actions were determined from the face of

the pleadings, subsequent joinder, substitution or intervention by members of the class non-diverse to the defendant did not affect federal jurisdiction. Under the new Rule, joinder or substitution of non-diverse parties would defeat federal jurisdiction upon a subsequent determination by the court that the suit could not be maintained as a class action. Therefore, joinder of non-diverse members of a class prior to a Rule 23 (c) determination imperils the jurisdiction of the federal court and the substantive rights of the parties. The natural and logical sequence of the proceedings, to avoid the foregoing consequences, dictate that there must be first a determination that the parties fairly and adequately represent the class. Thereafter, the court should determine the existence of any non-diverse members of the class whom the court considers indispensable parties. If at that juncture the court determines that the suit may proceed as a class action upon joinder of the indispensable parties, the order of maintainability as a class action should *first* be entered and then joinder of the indispensable parties required as a condition subsequent to the maintainability of the class action. To proceed in this manner would preserve federal jurisdiction because actions once determined to be class actions cannot be divested of federal jurisdiction by the subsequent joinder or substitution of additional non-diverse members of the class. Thus, the mechanics of preserving federal jurisdiction was within the power of the lower court. The continued application of a Rule of federal procedure which produces a result opposite from that intended by this Court is a condition of sufficient magnitude to warrant invoking the supervisory power of this Court over Circuit Courts of Appeal to the end that litigants are not denied their day in court and their rights summarily foreclosed by final dismissal at early pretrial stages.

The extreme futility of the action of the Court of Appeals in remanding the cases for entry of an order

of dismissal without prejudice is quite clear. The Court of Appeals, upon petition for rehearing, rehearing en banc and for modification and clarification of their June 28 opinion declined to rehear and specifically refused to modify their previous opinion to provide for the dismissal to stand but with leave to amend, which would permit an amended complaint, pursuant to Rule 15, to date from the filing of the original complaint and thus bar the defense of limitations. Seldom has a more cavalier approach been taken by a court of appeals.

Rule 23 as applied in these cases, and as approved by the Court of Appeals, manifests in every respect the objections and admonitions of Mr. Justice Black in dissenting to the amendments to the Rules[16] and in suggesting the addition of paragraph (c)[17] to Rule 41 as a means of preventing the denial of due process evidenced by the rigid application of Rule 23 as now condoned by the Fifth Circuit.

It is not uncommon that counsel for a moving party may be retained by and represent an entire class and the nature of the claims are such that a class action is superior to any other form of action and otherwise meets the requirements of Rule 23. If such condition exists, then,

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[16] 39 F. R. D. 272. "* * * The confusion created by the adoption of the present rules, over my objection, has been partially dispelled by judicial interpretations of them by this Court and others. New rules and extensive amendments to present rules will mean renewed confusion resulting in new challenges and new reversals and prejudicial 'pretrial' dismissals of cases before a trial on the merits for failure of lawyers to understand and comply with new rules of uncertain meaning."

[17] (c) "No plaintiff's case shall be dismissed or defendant's right to defend be cut off because of the neglect, misfeasance, malfeasance, or failure of their counsel to obey any order of the court, until and unless such plaintiff or defendant shall have been personally served with notice of their counsel's delinquency, and not then unless the parties themselves do or fail to do something on their own part that can legally justify dismissal of the plaintiff's case or of the defendant's defense."

under the interpretation applied by the District Court and approved by the Court of Appeals, all members of the class must be named as parties plaintiff and class actions collapse, not because of failure to meet requirements of the Rule but because of the selection of counsel, a circumstance which is unsupported by rule, case or statute.

If Rule 23 is to be applied as a Hobson's choice so as to permit lower courts, on pain of dismissal with prejudice, to enforce joinder of members of a class whose joinder would destroy federal jurisdiction, without any prior determination that the named parties do not fairly and adequately represent the interest of the class and without any finding that the members of the class whose joinder is demanded are necessary and indispensable parties, then this Court should abolish Rule 23 in protection of the rights of litigants whose claims might otherwise be sued on and recovered in independent actions.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

SAMUEL J. POWERS, JR.,
and

GEORGE P. BOWIE,
Counsel for Petitioners.

In the
United States Court of Appeals
For the Fifth Circuit.

No. 25,249.

Transit Casualty Company, et al.,
Appellants,

versus

Security Trust Company, et al.,
Appellees.

Appeals from the United States District Court for the Southern District of Florida.

(June 28, 1968.)

Before Wisdom and Coleman, Circuit Judges, and Comiskey, District Judge.

Per Curiam: The appellants brought this suit as a class action. Before the court reached a determination of appellants' right to maintain this suit as a class action, the district judge ordered appellants to "amend their complaints so as to include as parties plaintiff all members of the alleged class who have retained counsel for the plaintiffs to represent them in these two cases." Ten months later the district judge dismissed appellants' suit with prejudice when appellants failed to comply with this order. Rule 41(b) F.R.Civ.P.

We agree with the order of dismissal by the district court, but vacate that part of the order making the dismissal with prejudice and remand with instructions to enter the order without prejudice.

CORRECTED
in the
United States Court of Appeals
for the Fifth Circuit.

No. 25,249.

Transit Casualty Company, et al.,
Appellants,

versus

Security Trust Company, et al.,
Appellees.

Appeals from the United States District Court for the Southern District of Florida.

(August 29, 1968)

ORDER ON PETITION FOR REHEARING.

Before Wisdom and Coleman, Circuit Judges, and Comiskey, District Judge.

Per Curiam: Appellants filed a Petition for Rehearing and alternative Motion for Modification and Clarification of the June 28, 1968 Per Curiam of this Court.

For rehearing, appellants urge two principal points, both of which deal again with the merits or demerits of the District Court's order in attempting to define the

parties to be included within the appellant's class action. Again appellants overlook that really the only issue on appeal is the compliance vel non with the District Court's order of September 14, 1966, and, having found a failure of compliance on the part of appellants, the District Court's judgment of dismissal was affirmed with directions that the order be entered without prejudice as set out in our Per Curiam of June 28, 1968. This Court will not modify its previous ruling despite any Florida law claimed by appellants which may or may not bar a subsequent cause of action in any future suit.

It is therefore ordered that appellant's Petition for Rehearing and alternative Motion for Modification and Clarification of our June 28, 1968 Per Curiam are denied, and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12), the Petition for Rehearing En Banc is Denied.

United States Court of Appeals
for the Fifth Circuit.

October Term, 1967.

No. 25,249.

D. C. Docket No. Civ. 66-105 and 66-177A (Consolidated)

Transit Casualty Company, et al.,
Appellants,

versus

Security Trust Company, et al.,
Appellees.

Appeals from the United States District Court for the Southern District of Florida.

Before Wisdom and Coleman, Circuit Judges, and Comiskey, District Judge.

JUDGMENT.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, vacated in part and affirmed in part and that this cause be, and it is hereby remanded to the District Court with instructions to enter the order of dismissal without prejudice;

It is further ordered and adjudged that the appellants, Transit Casualty Company, and others, be condemned to pay one-half of the costs in this Court, and appellees, Security Trust Company, and others, be condemned to pay one-half of said costs, all of which has been executed out of the said District Court.

June 28, 1968

Court Costs:

Docketing cause, etc.....$25.00

Issued as Mandate: Sep. 6, 1968.